

# **EXHIBIT 2**

**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA - SOUTHERN DIVISION**

**HONORABLE DAVID O. CARTER, U.S. DISTRICT JUDGE**

TML RECOVERY, LLC, et al., )  
Plaintiffs, ) **Certified Transcript**  
vs. ) Case No.  
CIGNA CORPORATION, et al., ) 8:20-cv-00269-DOC-JDE  
Defendants. )

REPORTER'S TRANSCRIPT OF PROCEEDINGS

FINAL PRETRIAL CONFERENCE

MONDAY, SEPTEMBER 23, 2024

11:08 A.M.

SANTA ANA, CALIFORNIA

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1       they're waiting for the next administration. I have no idea  
2       what they're doing. But they're not in any hurry.

3                     Now, probably the "New York Times" article  
4       galvanized this. It came out, you know, rather recently, and  
03:36PM 5       so it probably galvanized this entire, let's say, newly found  
6       sensitivity by Congress because it's obvious in each of the  
7       letters that they cite back to the "New York Times" article.  
8       So there's a driving force for all of us.

9                     So you're entitled to present a number of  
03:37PM 10      investigators in this matter. How am I going to resolve that  
11       when Cigna objects and says, **"Judge, they're investigators.**  
12       **They're with the Department of Labor."** **Eventually there's no**  
13       **way to hide that, and it's going to be obvious that there's an**  
14       **investigation, just through their testimony.**

03:37PM 15                     Now, we can dress that up. We can pretend like --  
16       first of all, we might hypothetically exclude the ultimate  
17       conclusion by -- in the corrective letter. We might just go  
18       through the investigative portion. But everybody's going to  
19       know it's an investigation. And, in fact, it could be argued  
03:38PM 20      by Cigna that there's more prejudice because that investigation  
21       left unsaid isn't even a corrective letter.

22                     In a way, it's almost better for Cigna if it was a  
23       corrective letter so they could argue back in their letter that  
24       it's subject to a lot of disagreement. I don't know what to do  
03:38PM 25       with that yet. So it would almost be better if these letters

1 never went back and forth because we'd have a much purer  
2 lawsuit.

3 But apparently, a large part of your evidence is  
4 going to come, you know, from two or three of these  
03:38PM 5 investigators, isn't it? And don't you really want the jury to  
6 know that --

7 MR. EISENREY: No, I would say a very limited  
8 amount.

9 THE COURT: Sure.

03:38PM 10 Don't you really want them to know, though, that  
11 they're with the Department of Labor?

12 MR. EISENREY: Oh, absolutely.

13 THE COURT: Oh, absolutely. Of course you do.  
14 And what's the inference from that? Cigna's in

03:39PM 15 big-time trouble.

16 MR. EISENREY: Yeah.

17 THE COURT: Cigna's in big-time trouble. Of course  
18 it is. And Cigna should be objecting to it. It's prejudicial  
19 from your perspective because as soon as they say "the  
03:39PM 20 Department of Labor," something's up. And over the period of  
21 time, somebody's going to slip up. You can't put two or three  
22 people on the stand without something, you know, getting leaked  
23 out that, "Well, we're undertaking investigation." And if you  
24 don't say it to begin with, it's going to be self-evident  
03:39PM 25 anyway, isn't it? How do we resolve that? You're entitled to

1 it.

2 MR. EISENREY: I wonder if Mr. Rich Collins -- he's  
3 on the phone, Your Honor. He may have some comments to that if  
4 you're interested.

03:39PM 5 THE COURT: Well, certainly.

6 **(Mr. Collins appearing via**  
7 **Zoom/telephonic conference.)**

8 MR. COLLINS: Thank you, Mr. Eisenbrey, and thank  
9 you, Your Honor. This is Rich Collins calling in from my hotel  
03:40PM 10 room.

11 First of all, may I say thank you, Your Honor, for  
12 making the accommodation for me to at least call in. I have to  
13 say I am feeling really jealous missing out on being in your  
14 courtroom today with all this going on. But I'd be happy to  
03:40PM 15 address any of the Court's comments or questions, and  
16 particularly the one just posed, what do we do if the Court --  
17 if that was not a rhetorical question, simply what are our  
18 thoughts. I'd be happy to respond.

19 THE COURT: Well, I think you take a very aggressive  
03:40PM 20 position, and you should. I mean, from your perspective, this  
21 is information that's relevant --

22 MR. COLLINS: Yes.

23 THE COURT: -- and the Court shouldn't preclude it.  
24 I've been wrestling with that, about how wide open I want this  
03:41PM 25 trial to be, and finally, after going back and forth with all

1 the different motions, I've decided it's going to be a  
2 wide-open trial. And from your perspective, what you have to  
3 worry about is I'm going to let Cigna get into the opiate  
4 crisis, the billings, et cetera, the markups, et cetera, and  
03:41PM 5 they're going to be able to show that this passed costs onto  
6 patients.

7 From Cigna's perspective, they should be concerned  
8 because I'm going to let them show the same thing, that this  
9 passed cost onto patients. And as far as some of these motions  
03:41PM 10 going back to 2015 but 2018 rise, I'm probably going to let  
11 that in. I'm probably also going to let in, tentatively, your  
12 request to go back -- clear back to Cigna having a problem --  
13 and I forget the plan right now, but I'll go back to it in my  
14 notes -- clear back before 2010.

03:41PM 15 But those are only tentative thoughts, and I wanted  
16 to pay the courtesy to counsel listening to them before I  
17 handed down dispositive rulings. But I almost just handed down  
18 dispositive rulings in all these matters.

19 So I'm not quite certain how to dissipate that  
03:42PM 20 prejudice, and I don't think I can, quite frankly. I think  
21 you're entitled to it. But I'm going to hear from Cigna in  
22 just a moment.

23 So, Cigna, how do I dissipate this?

24 MR. CAPLAN: So in addressing just the DOL  
03:42PM 25 investigation, that is a very limited issue, and what the DOL

1 is looking into in this investigation and these two letters has  
2 no bearing whatsoever on the claims for the one patient who the  
3 jury will decide. The one patient whose claims are going to  
4 the jury does not have any claims, one, that went through the  
03:42PM 5 cost containment program --

6 THE COURT: Is this on the 00015 [sic]?

7 MR. CAPLAN: So, yeah, I was going to get to that.  
8 That's the second piece.

9 The first piece is just there's no claims for the  
03:43PM 10 one patient who is subject to the jury that went through the  
11 cost containment program at all.

12 Two, that patient does have a few H0015 claims, but  
13 the DOL's investigation does not apply to every Cigna plan and  
14 every Cigna methodology used to determine how those claims are  
03:43PM 15 paid. The most basic distinction is there are two types of  
16 plans; MRC I and MRC II plans --

17 THE COURT: Let's slow down for a moment.

18 MRC -- we're going to go very slowly. You're going  
19 to bear with me now.

03:43PM 20 MR. CAPLAN: Of course.

21 THE COURT: So your first argument and response was  
22 that crosswalking for pricing out-of-network benefits for the  
23 0015 for MRC I changed to partial hospitalization pursuant to  
24 APC 5863 on February 29th, 2024.

03:45PM 25 And your second was -- in your response July 19th,

1 2024, was that Cigna -- I can't read my own writing. Cigna was  
2 also evaluating the potential crosswalk for H0015 to intensive  
3 outpatient APC.

4 One of the reasons I started all these questions  
03:46PM 5 today was, how is that going with the Department of Labor?

6 MR. CAPLAN: So I was making a little bit of a  
7 different point right now, and the argument I'm making  
8 addresses how this evidence might come in at trial if your  
9 belief is that the plaintiffs are entitled to put it on.

03:46PM 10 THE COURT: Uh-huh.

11 MR. CAPLAN: There is no basis to put on evidence of  
12 the DOL's investigation in front of the jury because the one  
13 patient for whom the jury will decide their claims is not at  
14 all implicated by the issues in the DOL investigation, and  
03:46PM 15 that's because that patient has an MRC II plan, and the claims  
16 that were submitted using the H0015 code for that patient were  
17 not subject to the methodology that is being investigated by  
18 the DOL.

19 THE COURT: Okay. Let me hear a response for just a  
03:47PM 20 moment.

21 MR. COLLINS: Yes, Your Honor. Thank you. This is  
22 Rich Collins on the line for plaintiffs.

23 Cigna's counsel is, you know, dancing around on the  
24 issue. But this one claim being subject to the jury, that's  
03:47PM 25 Cigna's misunderstanding that only the one non-ERISA plan is

1 going to be heard by the jury. As I understood this Court's  
2 order, all of the claims are going to be presented in one trial  
3 at the same time in front of the jury and the Court. So I  
4 didn't think we were parsing out the evidence. That's the one  
03:48PM 5 fact about that presentation, because the other claims that are  
6 involved, the ERISA claims, do involve these issues that the  
7 Department of Labor is concerned --

8 THE COURT: You broke up.

9 MR. COLLINS: The second --

03:48PM 10 THE COURT: You broke up.

11 MR. COLLINS: Yes. My point is the ERISA claims  
12 that will be tried, Your Honor, the 19 other patients, there's  
13 one non-ERISA plan that we selected to present those state law  
14 claims, and Cigna's view is that only those are going to the  
03:48PM 15 jury.

16 But those ERISA claims for the other 19 patients are  
17 going to be presented to the jury as well. And those patients,  
18 their claims were impacted by the issues outlined by the  
19 Department of Labor, specifically the H0015 level of care for  
03:49PM 20 intensive outpatient treatment.

21 The other distinction that Cigna is trying to make  
22 here is that the MRC I versus MRC II plans is an issue. Now, I  
23 will grant that the Department of Labor only focused on the  
24 MRC I language, but at the heart of the Department of Labor's  
03:49PM 25 findings in their letter, which is Docket Number 513-20, that I

1 understand is still under seal, but in that letter, it talks  
2 about the real issue is this crosswalk to the Medicare rate,  
3 and the fact that there are no Medicare rates that this Court  
4 has established that it's undisputed for the services our  
03:50PM 5 clients provided.

6 Putting aside Mr. Antia's argument for a moment  
7 about the drug testing services only, the laboratory claims,  
8 but for the treatment, the facility services, that are at issue  
9 in the Department of Labor's letter, that -- the issue, the  
03:50PM 10 parity violation that the Department of Labor found relate to  
11 that crosswalk.

12 That crosswalk is employed by Cigna under both the  
13 MRC I and the MRC II plans. So even if the Department of Labor  
14 only focused on the MRC I and only as to one level of care,  
03:50PM 15 picking out the easiest and most obvious violation of the  
16 federal parity law, that doesn't negate the fact that the  
17 essential finding is this crosswalk which we've been arguing  
18 about for five years in this litigation, that Cigna has  
19 denied was an issue, and that we had to fight through discovery  
03:51PM 20 motions to get this evidence.

21 And finally now, because this Court unsealed those  
22 documents and the "New York Times" decided to write articles  
23 about it, are we finding that the Department of Labor is  
24 issuing findings that are consistent with these allegations.

03:51PM 25 How do we ameliorate that effect, Your Honor?

1 THE COURT: You haven't offered me a --  
2 MR. COLLINS: The way it sounds --  
3 THE COURT: You haven't offered me a solution --  
4 MR. COLLINS: The solution --  
03:51PM 5 THE COURT: Karlen, cut him off.  
6 MR. COLLINS: I'm sorry, Your Honor. I apologize --  
7 THE COURT: Let me do this again. I'm about to cut  
8 you off.  
9 What's your solution?  
03:51PM 10 MR. COLLINS: Yes. My --  
11 THE COURT: Quit arguing. What's your solution?  
12 MR. COLLINS: My solution is that we let the  
13 evidence come in and we allow Cigna's counsel to do what he  
14 just did in his argument and try to cross-examine and impeach  
03:52PM 15 those findings by suggesting that those findings have no  
16 application to these claims --  
17 THE COURT: All right. Thank you. Thank you.  
18 All right. Now, that's why I've asked each of you  
19 about this crosswalk again, because I'm assuming that MCR I  
03:52PM 20 [sic] is obviously the crosswalk between H0015 and -- let me  
21 make sure I get my codes correct -- 5823, APC.  
22 MR. COLLINS: Yes, APC --  
23 THE COURT: Thank you. I don't need your help right  
24 now.  
03:52PM 25 MR. COLLINS: Sorry.

1 THE COURT: I want you to be quiet for a moment.

2 MR. COLLINS: I will.

3 THE COURT: And now I'm assuming under MCR II -- or  
4 am I incorrect? Is it MCR I or MCR II that we have another  
03:53PM 5 crosswalk between H0015 and APC 5863? Is that under MCR II?

6 MR. CAPLAN: That's incorrect.

7 THE COURT: Incorrect? It's under I?

8 MR. CAPLAN: It is a different methodology for  
9 MRC II. So the --

03:53PM 10 THE COURT: Is it under MCR II or I?

11 MR. CAPLAN: MRC I.

12 THE COURT: Still under I?

13 MR. CAPLAN: Yes.

14 THE COURT: Okay. Thank you.

03:53PM 15 Do you disagree with that, agree with that, it's  
16 under I?

17 MR. COLLINS: I disagree -- I disagree that it's  
18 limited to just their MRC I plans.

19 MR. CAPLAN: So the MRC II crosswalk for H0015 --

03:53PM 20 THE COURT: Should be to 5863.

21 MR. CAPLAN: Yes, that's correct. Sorry, I thought  
22 you were --

23 THE COURT: I just said that. Let me say it again.

24 The MCR II should be our crosswalk with H0015 to 5863.

03:54PM 25 MR. CAPLAN: For MRC II plans, that's correct, yes.

1                   THE COURT: Okay. And I just asked at the beginning  
2 of this about whether -- because Cigna said that they are  
3 evaluating, quote/unquote, "the potential crosswalk of H0015 to  
4 intensive outpatient APC." I don't know what that is. In  
03:54PM 5 other words, I don't know if that's a separate code.

6                   Help me. Look at your July 19th letter. Look at  
7 page 2. Look at the first paragraph, and it says:

8                   "Cigna -- the Department's primary concern  
9 should be moot because the crosswalk for pricing  
03:55PM 10 out-of-network benefits for H0015 changed to a  
11 partial hospitalization, APC 5863, on February 29,  
12 2024."

13                  It's the next sentence that's of interest to me:  
14                  "Cigna is also evaluating the potential  
03:55PM 15 crosswalk of H0015 to intensive outpatient APC that  
16 CMS implemented this year."

17                  Does that have a code? And if so, what's that code?

18                  MR. ANTIA: That code is forthcoming from CMS.

19                  THE COURT: That's what I thought. We don't have a  
03:55PM 20 code.

21                  MR. ANTIA: There's a proposed code that has not  
22 yet -- I think it might be implemented just recently, Your  
23 Honor.

24                  THE COURT: We don't have a code.

03:56PM 25                  MR. ANTIA: Correct.

1 THE COURT: That's what I'm reading.

2 MR. ANTIA: Correct.

3 THE COURT: Okay. And that's why I started this  
4 conversation with this *in limine* motion asking what the status  
03:56PM 5 of this is. And we just don't know at the present time.

6 MR. ANTIA: Correct, Your Honor.

7 THE COURT: Why do we believe it might be  
8 forthcoming? Because it would be helpful. Because then the  
9 Department of Labor would be back saying, "You know what? This  
03:56PM 10 is a good crosswalk" or "it's not."

11 MR. ANTIA: I didn't pick up the start of your  
12 question. Why do we think --

13 THE COURT: Why do we think it might be forthcoming?

14 MR. ANTIA: The code?

03:56PM 15 THE COURT: Yeah.

16 MR. ANTIA: Oh, because CMS published for the first  
17 time and pronounced under the "Federal Register"; right? Just  
18 like they did with 5863 --

19 THE COURT: No --

03:56PM 20 MR. ANTIA: -- but they published that they are  
21 going to reimburse these facilities, like plaintiffs --

22 THE COURT: Let's say that this code came out  
23 halfway through the trial, hypothetically, and let's say that  
24 the Department of Labor was favorable to MRC II and your  
03:57PM 25 crosswalk from H0015 to this new code, and it matched, you

1 know, three hours per day, five days a week, or something close  
2 to it.

3 As I was concerned about prejudice for Cigna, now I  
4 would be concerned about the prejudice, after opening  
03:57PM 5 statements and getting halfway through this trial, to you, the  
6 plaintiff, because in a sense, it would take the sting out  
7 of -- and the Department of Labor comes back halfway through  
8 the trial, and they might have a disagreement with H0015 being  
9 crosswalked to -- let me get this down -- 5823, but they don't  
03:58PM 10 have a disagreement now to H0015 being crosswalked to this new  
11 code. That takes a lot of sting out of your case.

12 Now, hold on. You don't have an answer for that, so  
13 you don't have to comment. That's my concern. You know, it's  
14 how to stop that kind of prejudice for each side when the  
03:58PM 15 Department of Labor just came out of their sleepy hollow and  
16 might be doing something about that only because some senators  
17 wrote -- only because the "New York Times," you know, got  
18 enough notoriety to get somebody to do something. Not that I'm  
19 critical of Congress. I would never be, but...

03:58PM 20 And so I share your fear, on the plaintiff side,  
21 that this could go on forever. Unless this case gets started,  
22 this could go on forever. And what I'm afraid of is that if I  
23 continue this case for six months or a year, we're going to be  
24 right back in the same position.

03:58PM 25 I'm also fearful of an election with a different

1 administration or the same type of administration coming in. I  
2 have no idea what position they're going to take with a new  
3 member of Department of Labor, for both of you.

4 MR. COLLINS: Yes.

03:59PM 5 THE COURT: And so I wish it was two years ago that  
6 we were getting the case off the ground or two years in the  
7 future, but right now, we're in this transition period where  
8 you could have a complete change in the Department of Labor.

9 So how do we push this case forward fairly for both  
03:59PM 10 of you? I've really been trying to weigh that for the last  
11 literally week, trying to sort out in your *in limine* motions,  
12 how I felt about a wide-open trial or starting to make rulings  
13 that I used to hate when I was litigating when the judge just  
14 chopped up my case. And if he or she guessed wrong, you know,  
03:59PM 15 it's unbalanced. That's why I'm telling you, you're going to  
16 have a pretty wide-open trial here.

17 MR. CAPLAN: So for this particular issue, my  
18 suggestion is, if this evidence comes in, it should be heard  
19 outside of the presence of the jury because it does not relate  
04:00PM 20 to the claims, only one patient.

21 THE COURT: No. You haven't heard me. It's going  
22 to be a wide-open trial. This is coming in front of the jury.

23 MR. EISENREY: If I've heard Your Honor correctly,  
24 what it seems to be you're asking for is how long is it going  
04:00PM 25 to take the Department of Labor to issue their final ruling --

1 THE COURT: Exactly --

2 MR. EISENBREY: -- and who do I need to contact? And  
3 we're all baffled because it's Cigna who's dealing with the  
4 Department of Labor, and Cigna's not here. Their counsel is.

04:00PM 5 THE COURT: Hold on.

6 The problem is that Cigna may be acting very  
7 ethically, though. They've got the Groom -- or whoever they  
8 are -- Law Group negotiating with the Department of Labor  
9 because there may be a conflict, you know, with you negotiating  
04:00PM 10 with them. I don't know.

11 The one thing I know, though, is I can't treat Cigna  
12 like a segmented worm, in other words, different portions of  
13 Cigna dealing with, through different counsel, the Department  
14 of Labor. But I do understand your predicament as counsel.  
04:00PM 15 You have no control over Groom. You're not part of that  
16 discussion.

17 MR. EISENBREY: Their general counsel that Cooley  
18 deals with is James Carroll. His name is right on the letter.  
19 We should call James Carroll at Cigna and say, "What's the  
04:01PM 20 status of this DOL?"

21 MR. CAPLAN: We did and we reported to you earlier  
22 today, Mr. Eisenbrey.

23 THE COURT: Well, he hasn't reported to me. Time  
24 out.

04:01PM 25 MR. CAPLAN: And we did to you as well.

1 THE COURT: Time out. I'm asking now.

2 What is the status of this? What did you report to  
3 other counsel?

4 MR. CAPLAN: What we reported to you and Counsel  
04:01PM 5 this morning is that there's no time frame for the resolution  
6 of the issue with the DOL. You asked us to get the contact  
7 information for the individual at the DOL that Cigna is  
8 currently dealing with, and we have that for you.

9 That's what you asked us to do this morning.

04:01PM 10 THE COURT: And who is that person, then? Because  
11 this is new information to me. Thank you.

12 MR. CAPLAN: Correct. This is what you asked us to  
13 do during lunch, which we did.

14 THE COURT: I didn't know that. Thank you. I'm  
04:01PM 15 thanking you.

16 Who is it?

17 MR. CAPLAN: She's in the Office of the Solicitor of  
18 Plan Benefits Security Division. Her name is Sarah with an H,  
19 so S-a-r-a-h, D. Holz, and that's H-o-l-z.

04:02PM 20 THE COURT: I'm sorry. It's Sarah --

21 MR. CAPLAN: Yes. Sarah Holz, H-o-l-z.

22 THE COURT: H-o-l-z.

23 And is she the person who will make this decision --  
24 I know the director will.

04:02PM 25 MR. CAPLAN: Yes, she is the person who is on the

1 DOL side in charge --

2 THE COURT: So the investigators are reporting to  
3 her --

4 MR. CAPLAN: Correct.

04:02PM 5 THE COURT: -- to make the recommendation -- she  
6 doesn't make the decision, but to make the recommendation to  
7 the director?

8 MR. ANTIA: Again, we're not counsel in that case.

9 So with that caveat, Your Honor, that is our understanding.

04:02PM 10 THE COURT: Well, first of all, let me thank you for  
11 making progress here.

12 MR. ANTIA: That's what we are trying to do, by the  
13 way. We are trying to make progress and trying to get to trial  
14 to get this resolved.

04:02PM 15 THE COURT: Well, I know, but from their position,  
16 you're dragging your feet. From your position, you're trying  
17 to move ahead.

18 MR. ANTIA: Correct.

19 THE COURT: I just am very, very concerned as we get  
04:02PM 20 down this line that in this changing landscape, potentially one  
21 of you is damaged in the middle of trial and harmed by  
22 decisions being made that then, you know, become relevant to  
23 our case. But unless I push the case forward, I don't think  
24 anything's going to happen for a long time.

04:03PM 25 So we're going to push it forward, and that's going

1 to make it very inconvenient, because when you ask for this  
2 division of time between the two of you -- first of all,  
3 whatever time I give to the plaintiffs, you're going to have  
4 equal time. Let's just resolve that right now.

04:03PM 5 MR. ANTIA: Thank you, Your Honor.

6 THE COURT: So the end result is that I don't know  
7 that time frame yet. And what you don't know yet is  
8 eventually, sometime this week, you'll start in with every  
9 witness that you're going to present and match up the evidence  
04:03PM 10 that you're going to put on.

11 So we just finished a month-long trial involving  
12 neuro psycho modulation therapy implants, and I had three  
13 objections that caught me off guard. That was it. And by the  
14 time we're done, I will know each objection the night before.

04:04PM 15 Now, here are the rules. You're Plaintiff. You're  
16 first out of the box. You'll take witness number 1 eventually,  
17 this week or next week, because you're with me now until we get  
18 it done. And I'm just forewarning you, you've got a lot of  
19 attorneys. So unless you want to be here the rest of your  
04:04PM 20 natural life, you're going to take witness number 1, and you're  
21 going to put down all of the items of evidence that you believe  
22 that you're going to present.

23 On cross-examination, you don't need to disclose  
24 that to me. You have the right to surprise the other side. So  
04:04PM 25 I don't need to know what those evidentiary items are that you

1 THE COURT: Thank you. The --

2 MR. COLLINS: I'm sorry, Your Honor, if I could  
3 respond to the parity violation point that Mr. Caplan raised.

4 THE COURT: Please.

04:11PM 5 MR. COLLINS: Yes. I raised that because the

6 Department of Labor raised that, and that's a big issue because  
7 reimbursement rates create this unquantitative limitation, and  
8 that's an issue that Cigna needs to confront because their  
9 plans require them to comply with the parity law. If they're  
04:12PM 10 not, they're violating their plans. They're in breach of their  
11 plans, and that's what we've sued them for.

12 And in addition to that, the Department of Labor  
13 draws a correlation between that violation and the issues in  
14 this case when it concludes its letter by asking Cigna to  
04:12PM 15 provide the Department with a list of all of its members, its  
16 participants and the beneficiaries, who have been adversely  
17 affected by these practices. And it asks Cigna to please  
18 describe whether and how Cigna will make payments to those  
19 participants and beneficiaries who are adversely affected.

04:12PM 20 And that's what we've been asking for five years in  
21 this case, "When are you finally going to pay what you owe  
22 under your plans?"

23 And now that we've presented the evidence and now  
24 that the Department of Labor has concluded that you're  
04:13PM 25 violating the federal parity laws with this crosswalk, it's

1 time for Cigna to face that and to pay what they owe.

2 THE COURT: In Limine Motion Number 9, "Requiring a  
3 federal agency or official to attend trial."

4 I'm denying this motion at the present time because  
04:13PM 5 the Court doesn't have jurisdiction and is uncomfortable  
6 ordering DOJ to appear in this court. They could be made aware  
7 of this through either of you, if you decide, but I think  
8 that's an independent decision by the Department of Justice.

9 Also, I think that there's a prejudicial effect if  
04:13PM 10 it's called to the jury's attention that DOJ is present. It  
11 implies that there's a criminal investigation going on, and  
12 this is a civil matter.

13 As far as the Labor Department, I'm trying to get  
14 the Labor Department to respond as gently as possible. I'm  
04:14PM 15 afraid that if I cause -- well, if I have them -- if I bring  
16 them in through intervention, the difficulty will be it will  
17 cause delay. I'll get flooded with attorneys, as I have in the  
18 past, and there will be a claim of -- all the way up to  
19 executive privilege, believe it or not.

04:14PM 20 And also, it will set this case over for at least  
21 another year, in my opinion. Just for due process grounds,  
22 they have a right to be heard. And this case needs to get  
23 pushed forward in some form for the benefit of both parties.

24 So, hopefully, we'll do it through request. And  
04:14PM 25 certainly, on October 1st, we have three people who are

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
SOUTHERN DIVISION AT SANTA ANA  
HONORABLE DAVID O. CARTER, JUDGE PRESIDING

**CERTIFIED TRANSCRIPT**

TML RECOVERY, LLC, et al., )  
                                  )  
                                  )  
PLAINTIFFS,                 )  
                                  )  
                                  )  
vs.                            ) SACV NO. 20-00269-DOC  
                                  )  
                                  )  
CIGNA CORPORATION, et al., )  
                                  )  
                                  )  
DEFENDANTS.                 )  
                                  )  
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REPORTER'S TRANSCRIPT OF PROCEEDINGS  
SANTA ANA, CALIFORNIA  
TUESDAY, SEPTEMBER 24, 2024  
8:08 A.M.

DEBORAH D. PARKER, CSR 10342  
OFFICIAL COURT REPORTER  
UNITED STATES DISTRICT COURT  
411 WEST FOURTH STREET  
SUITE 1-053  
SANTA ANA, CALIFORNIA 92701  
(657) 229-4305  
[transcripts@ddparker.com](mailto:transcripts@ddparker.com)

08:48:34 1 determination was arbitrary and capricious.

2 Anything else would be prejudicial and not  
3 probative and any subsequent remedial measure is also not  
4 probative under the law, including the cases we cited.

08:48:51 5 THE COURT: Just one moment.

6 MR. ANTIA: Thank you.

7 (Pause.)

8 THE COURT: So as a practical matter, I want you  
9 to push back in just a moment. But one of the things that  
08:49:55 10 practically you'd be concerned about would be in the  
11 July 19th, 2024 letter when you stated to the Department of  
12 Labor that the crosswalk for pricing out-of-network benefits  
13 for H0015 changed to partial hospitalization with APC5863 on  
14 February 29th, 2024. And as a practical matter, what would  
08:50:30 15 be damaging is that if the Court allowed in those changes,  
16 it would make it appear to the trier of fact that Cigna only  
17 made those changes because there was something, let's see,  
18 inappropriate from that 2016 to 2020 matter.

19 Now, as a practical matter, that's just one of the  
08:50:56 20 many areas that I would think Cigna would be concerned  
21 about.

22 MR. ANTIA: That's an example. Exact on point, an  
23 example.

24 THE COURT: Okay. I understand. Thank you.

08:51:03 25 Counsel.

08:51:05 1 MR. KELLY: Thank you, Your Honor.

2 This is Tom Kelly, again, on behalf of plaintiffs.

3 I believe we discussed the administrative record  
4 issue at length yesterday, and it is our understanding -- or  
08:51:14 5 plaintiffs' understanding that the Court would entertain  
6 evidence outside of the administrative record in this  
7 matter. So that's just in response to Cigna's comments on  
8 that.

9 But as an initial matter, plaintiffs believe that  
08:51:25 10 this motion should be denied because of Cigna's failure to  
11 specify any evidence in its papers that it wishes to have  
12 excluded, and --

13 THE COURT: Let's just assume that they had.  
14 Let's assume that I was not too concerned about their lack  
08:51:42 15 of specificity but the harm that might be caused.  
16 Obviously, this is a developing case. We're all going to be  
17 caught flatfooted, apparently, without depositions that we  
18 would normally give to some of these witnesses, because  
19 we're going forward now. And I don't see any other way to  
08:51:57 20 get this case off the ground, including Healthcare and  
21 Anthem and some of the other issues, unless apparently we  
22 just have depositions as we go and have a trial; otherwise,  
23 we'll be sitting here for years.

24 So let's say I'm just very generous towards Cigna.  
08:52:12 25 And whether they specify it or not, I'm pointing out one of

08:52:13 1 the many areas that they would be concerned about that would  
2 be prejudicial. So you're not going to prevail on the  
3 specificity.

4 Now, what's your next argument?

08:52:22 5 MR. KELLY: Our next argument, Your Honor, would  
6 be that plaintiffs would not intend to offer this evidence  
7 as a subsequent remedial measure on behalf of Cigna.  
8 Rather, it underscores the fact that there were not  
9 applicable Medicare rates during the relevant time period.

08:52:37 10 And as we discussed yesterday, and as Your Honor knows, in  
11 January -- as of January 1, 2024, CMS changed its  
12 reimbursement methodologies for 80015 among other codes and  
13 is now reimbursing SUD treatment through the Medicare  
14 program.

08:52:54 15 THE COURT: Okay. Thank you.

16 Why isn't this resolved from your standpoint,  
17 although I understand you don't want this in?

18 Would either appropriate instructions by the Court  
19 with a limitation of the standard to this time period,  
08:53:05 20 recognizing that there's a pullover effect that could affect  
21 a jury -- I understand that -- but they're supposed to  
22 follow my instructions.

23 Second, why is there a concern when we don't have  
24 a code? In other words, if we don't have a code at that  
08:53:20 25 time, you have a very good reason, you know, for the

08:53:25 1 limitation to the 2016-2020 period, because we're still  
2 struggling with what this code is going to be. So I don't  
3 understand the harm with appropriate instructions by the  
4 Court. I do understand the potential prejudice. I  
08:53:39 5 understand your concern.

6 MR. ANTIA: That's the main concern, Your Honor.  
7 And what Mr. Kelly just alluded to is they're going to use  
8 it as both a sword and a shield, right? That's the problem,  
9 right? And if --

08:53:51 10 And, again, it's not Cigna that made that change.  
11 I want to be clear on that July 19th letter. It's MultiPlan  
12 that's in charge of its own database that's making the  
13 change in how they code. Cigna does not have any role in  
14 that.

08:54:05 15 THE COURT: Well, I know that, but that's not  
16 going to be an argument that prevails, because you contract  
17 with MultiPlan.

18 MR. ANTIA: I understand. I want to make sure the  
19 record is clear. Separately, on the MRC II, which is the  
08:54:16 20 majority of the plans, Cigna had been crosswalking to 5863  
21 since --

22 (Court Reporter requests clarification for the  
23 record.)

24 MR. ANTIA: Sorry. Cigna had been crosswalking  
08:54:25 25 to --

08:54:26 1 THE COURT: -- 5863 --

2 MR. ANTIA: -- since 2015 -- late 2015, on the  
3 MRC II plans which are the majority of the plans in this  
4 entire case and the majority of the plans in the trial.

08:54:39 5 THE COURT: Let me repeat back. You said you'd  
6 been crosswalking to 5863 since 2015?

7 MR. ANTIA: Late 2015.

8 THE COURT: Because the letter indicates that this  
9 change took place on February 29th of 2024.

08:54:55 10 MR. ANTIA: That's where I want to try to clarify  
11 for Your Honor.

12 There's two different health plan offerings that  
13 Cigna offers to its employers -- the employers that want to  
14 contract with Cigna to do --

08:55:05 15 THE COURT: I understand. MACR I and MACR II.

16 MR. ANTIA: MRC I. Sorry. You're getting them  
17 flipped. But, yes, MRC I and MRC II.

18 MRC I -- out-of-network rates -- are based on a  
19 charge-based database selected by Cigna. The charge-based  
08:55:23 20 database that Cigna selected for all out-of-network  
21 claims -- not just said claims -- was the MultiPlan Viant  
22 database, V-I-A-N-T, out-of-network facility database. They  
23 selected that in late 2015 for MRC I.

24 For MRC II, the plan language states:

08:55:49 25 "Out-of-network facility claims can be

08:55:52 1 reimbursed based on a methodology  
2 similar to Medicare."  
3 So when this issue arose, Cigna identified  
4 Medicare reimbursement rates for the drug; the  
08:56:03 5 urine-testing, the breathalyzers that they are charging  
6 close to \$2,000 for. Medicare has set prices for those and  
7 Cigna reimbursed on MRC II based on a methodology similar to  
8 Medicare for those drug tests.

9 For the intensive outpatient, which is H0015,  
08:56:22 10 which these plaintiffs were billing Cigna plans for, for  
11 MRC II, starting in late '15, Cigna created a crosswalk. It  
12 looked at what was Medicare reimbursing that was most  
13 similar to the care that these plaintiff providers were  
14 providing Cigna Health Plan members. They identified the  
08:56:44 15 partial hospitalization services. Again, if you go to Hoag,  
16 and you go into their community health clinic or mental  
17 health clinic and you go in there five days a week for  
18 20 hours, that's the 5863 code.

19 So starting in late 2015, Cigna crosswalked to  
08:57:02 20 that code, which would pay more, because it's 20 hours a  
21 week versus the nine hours a week that these plaintiffs were  
22 charging for. So late in 2015 for MRC II plans, Cigna  
23 started that crosswalk and has maintained that crosswalk  
24 until today, until this new potential code that Mr. Kelly  
08:57:23 25 just referenced becomes available.

08:57:26 1           But since 2015, that crosswalk -- and this is  
2 really critical. I just want to say one thing on  
3 Dr. Barthwell's motion *in limine*. The *United Healthcare*  
4 case did not include an MRC II crosswalk like Cigna's. It's  
08:57:41 5 specific to Cigna. Her report is flawed and not credible,  
6 because it didn't take that into consideration. All she  
7 focused on was the MRC I MultiPlan because that was what was  
8 at issue in *United* and *Anthem* and who he knows what else.

9           But MRC II, specifically to Cigna, Dr. Barthwell  
08:58:01 10 did not look at that in her initial report which was a  
11 cut-and-paste.

12           THE COURT: But your MRC -- correct me. I'm going  
13 to reverse that.

14           MR. ANTIA: It's hard. Yeah, MRC, I know. It's  
08:58:09 15 easier to say "Maximum Reimbursable Charge." It's probably  
16 much easier just to say that.

17           THE COURT: There's a lot of acronyms that I'm  
18 going to have to get used to.

19           MR. ANTIA: Yes.

08:58:20 20           THE COURT: Just bear with me for a while.

21           Regardless, even if you employed the APC5863 in  
22 2015, how would you respond that it's a differentiation  
23 without a difference in this regard? And that is, you can  
24 change it to MCR? MRC?

08:58:57 25           MR. ANTIA: MRC.

08:58:59 1           THE COURT: MRC. I'll slow down to make sure I  
2 get that right. And thank you.

3           What does it matter? Because still you're writing  
4 back to the Department of Labor in February of 2024, *Look,*  
08:59:10 5 *this is a change we're making.*

6           So it seems to be, as a gatekeeper, that that's an  
7 issue for the jury to decide; that I shouldn't be precluding  
8 either one of you or limiting you. And why would I limit  
9 the plaintiffs in this regard, just because Cigna chooses to  
08:59:30 10 change it to -- hold on. Don't help me, because I'm going  
11 to constantly reverse it -- MCR I to a designation of  
12 MCR II? You still use that with the -- not you, personally.  
13 I mean, Cigna still uses that with the Department of Labor  
14 to point out this differentiation. I don't see how I limit  
08:59:57 15 that, because that's one of the defenses that Cigna throws  
16 up in good faith to the Department of Labor.

17           MR. ANTIA: I think there's multiple different  
18 issues going on there.

19           THE COURT: Yeah, there are.

09:00:10 20           MR. ANTIA: So, again, the Department of Labor  
21 only has overview of ERISA plans -- fully insured ERISA  
22 plans under that MRC I, which is the MultiPlan charge base  
23 database. It has nothing to do with MRC II. The fact that  
24 MultiPlan -- we put in the letter -- MultiPlan changed its  
09:00:33 25 crosswalk as of February 29, 2024 to going to 5863, right?

09:00:39 1 How is that relevant to the claims determinations that Cigna  
2 made in the 2015 -- late 2015 to 2019 time period?

3 The fact that a subsequent change occurred has no  
4 relevance under the ERISA standard for whether the Cigna, as  
09:01:01 5 a fiduciary -- right? -- promptly administered the claim  
6 benefit determinations under the abuse of discretion  
7 standard.

8 THE COURT: Okay. I'll come back to you in just a  
9 moment.

09:01:13 10 MR. ANTIA: Thank you, Your Honor.

11 MR. KELLY: Thank you, Your Honor.

12 I think that this argument in some ways dovetails  
13 into the motion *in limine* that Cigna filed regarding the  
14 Ingenix evidence, because Mr. Antia raised the issue as to  
09:01:27 15 changes made by Cigna in 2015. And plaintiffs would contend  
16 that those changes were made because of the expiration of  
17 the consent decree. And I know that we'll get into that in  
18 a little bit, Your Honor. But we do believe that this  
19 evidence would not be used as evidence of a subsequent  
09:01:42 20 remedial measure on behalf of Cigna to clean up its acts, so  
21 on to speak, but rather that -- it just underscores the fact  
22 that there was no Medicare rate during the relevant time  
23 period and so Cigna came -- used MultiPlan to concoct  
24 crosswalks to inapplicable APCs such 5823 --

09:02:08 25 *(Court Reporter requests clarification for the*

09:02:08 1 record.)

2 MR. KELLY: APCs --

3 THE COURT: No, you're going to have to repeat the  
4 whole phrase. We didn't understand it.

09:02:10 5 MR. KELLY: I apologize.

6 That Cigna used MultiPlan to concoct inapplicable  
7 rates using -- or inapplicable crosswalks to APC5823 from  
8 80015. And so the fact remains that they did that only  
9 because there was no applicable Medicare rate and Cigna had  
09:02:36 10 been previously reimbursing these services at the providers'  
11 billed charges, and this was quite disturbing to Cigna's  
12 bottom line as we've seen in some of the e-mails that were  
13 compelled to be produced by this Court.

14 And so we would contend that this evidence should  
09:02:53 15 be admissible because it would be offered for a proper  
16 purpose, not as a subsequent remedial measure by Cigna.

17 THE COURT: And what is that purpose?

18 MR. KELLY: That purpose would be to demonstrate  
19 that there was no Medicare rate during the relevant time  
09:03:07 20 period.

21 THE COURT: I think that's going to be easily  
22 demonstrated through other testimony.

23 MR. KELLY: When it also could potentially be used  
24 as impeachment against Cigna's experts -- "expert," I should  
09:03:21 25 say -- Dr. Clark.

09:05:44 1 for certain codes, including 80015 in January 1, 2024, Cigna  
2 could no longer perform these crosswalks and so it was a  
3 change in the regulatory scheme that Cigna had to adopt or  
4 abide by. And so we would also contend that that change in  
09:06:02 5 the law would also be appropriate.

6 THE COURT: All right. Before I move on to the  
7 next --

8 (Overalking: Unable to report.)

9 THE COURT: No. I'm sorry.

09:06:07 10 MR. ANTIA: Sorry.

11 THE COURT: No. Go ahead.

12 MR. ANTIA: That's the definition of a subsequent  
13 remedial measure -- what Mr. Kelly just articulated -- a  
14 change in the law that Cigna now has to abide by. That's a  
09:06:21 15 definition under "subsequent remedial measures" and that has  
16 no bearing on what Cigna did and whether their  
17 determinations in 2015 to 2019 were arbitrary and capricious  
18 under the abuse of discretion standard.

19 THE COURT: Counsel, you have the last word.

09:06:37 20 MR. KELLY: Your Honor, we would contend both  
21 points are still valid as defenses against Cigna's or  
22 opposition to Cigna's motion *in limine*. We believe that the  
23 adoption of the inapplicable Medicare rates just underscores  
24 the fact that there was no relevant Medicare rate. We  
09:06:57 25 understand that this issue is highly complicated now because

09:07:00 1 of the Department of Labor letters. But, again, this  
2 evidence would simply be limited not as a subsequent  
3 remedial measure but to underscore that earlier fact that  
4 I've mentioned several times now.

09:07:14 5 Thank you.

6 THE COURT: Before we go on to the next  
7 motion *in limine*, let me ask each of you how a jury is going  
8 to absorb the different acronyms in this case. When you  
9 read the letter for the first time, at least for the Court,  
09:07:44 10 I admit with transparency, it's a very difficult read.

11 I've spent a long time as a Judge trying to absorb  
12 the facts. But when you get involved in a new terminology,  
13 whether it's patent law or something in your field, it's a  
14 whole new world for lay jurors. And, for instance, when I  
09:08:07 15 see the "MHP" --

16 MR. COLLINS: Mental Health Parity --

17 THE COURT: Counsel, thank you. I don't need your  
18 help. I appreciate it.

19 MR. COLLINS: I'm sorry.

09:08:23 20 THE COURT: You speak when you're spoken to.

21 MR. COLLINS: I do apologize.

22 THE COURT: When I see the "MHPAEA", the "Mental  
23 Health Parity and Addiction Equity Act," trust me, when you  
24 read through the letter, I have to keep going back to that  
09:08:45 25 and absorb what that is -- or try to.

09:08:53 1           With "HCPCS" codes, the jury will certainly  
2 understand eventually what "80015" is and the concept. But  
3 when you throw in "MCPCS," they have no idea what that is.

09:09:14 4           "Gap filling" will be easily explained to a jury  
5 conceptually. It needs no definition.

09:09:36 6           "CMS," counsel, I had to think very quickly what  
7 "CMS" meant. I understand it, but I have to go back and  
8 slow down and absorb that. The jury is not going to  
9 understand that terminology. They will after maybe the  
09:10:02 10 first or second week, but your evidence is going to be lost  
11 very quickly in this cloud of acronyms.

12           "APC," Ambulatory Payment Classification, they'll  
13 understand the concept. But when they first hear that,  
14 they're not going to have any idea what that acronym stands  
09:10:02 15 for: "OPSAF."

16           ~~"So before 2018, Viant OPR priced H0015,~~  
17           ~~using national level charged data in the~~  
18           ~~CMS OPSAF, because CMS did not have an~~  
19           ~~APC crosswalk for H0015 and the OPSAF,"~~  
09:10:40 20           ~~say what to a jury?~~

21           In other words, what I'm driving home is, we need  
22 a chart of some kind agreed to by all -- by all the parties.

23           The "OPR white paper." I don't need a definition  
24 of the "white paper," if it comes out, but "OPR"? What is  
09:11:06 25 that?

09:11:11 1 MR. COLLINS: Outpatient Repricer, Your Honor.

2 THE COURT: Well, that's nice.

3 MR. COLLINS: Because they're both "Outpatient  
4 Repricer" and we have an IPR, "Inpatient Repricer."

09:11:21 5 THE COURT: It doesn't matter if you understand  
6 it, or I don't. The jury doesn't understand it.

7 MR. COLLINS: You're right.

8 THE COURT: All right. Let me see some more of my  
9 notes. It's magical mystery tour.

09:11:36 10 "NQTL." Quiz: What does that mean? Counsel, I'm  
11 not speaking to you by phone. I'm talking to the lady.

12 MR. ANTIA: Non --

13 THE COURT: No, no, Counsel. Counsel, not --

14 MR. ANTIA: My apologies. I didn't know you  
09:11:53 15 were -- my apologies.

16 THE COURT: What does that mean?

17 MS. OLIN: I don't know that acronym offhand.

18 THE COURT: What does that mean?

19 MS. SHELTER: I do not know, Your Honor.

09:12:00 20 THE COURT: Of course. It means "Nonquantitative  
21 Treatment Limitation."

22 Now, I understand that after multiple reading of  
23 the documents, but a jury has no idea what either one of you  
24 are talking about.

09:12:13 25 "MS": Medical Surgery. That's pretty.